United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 76-4104

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MONROE TUBE COMPANY, INC.,

Respondent.

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P/S

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by assisting and encouraging its employees to withdraw their union authorization cards.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their union activities and union sentiments.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) for enforcement of its order (A. 58-59)[1] against respondent Monroe Tube Company, Inc. ("the Company") proposed on September 15, 1975 and adopted on December 1, 1975 (A. 62-64).[2] The Board's decisions are reported at 220 NLRB No. 48 and 221 NLRB No. 151. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Monroe, New York, where the Company's plant is located.

I. THE BOARD'S FINDINGS OF FACT

In brief, the Board found that the Company violated Section 8(a)(1) of the Act by encouraging and assisting employees to withdraw their union authorization cards, and by interrogating employees about their union activities and union sympathies. The facts upon which the Board based its findings are summarized below.

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[1] "A" references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The Decision of the Administrative Law Judge who initially heard this case was issued on May 16, 1974 (A. 3-47, 48). On December 10, 1974, as a result of its determination that the Administrative Law Judge's Decision reflected bias against the Company, the Board issued an order directing a hearing *de novo* before a different Administrative Law Judge (A. 48, 65). Thereafter, the parties filed various motions with the Board; the General Counsel (with support from the charging party) joined the Company in requesting a stay of the order for a hearing *de novo* (A. 48). The Board, noting that there was apparent agreement among all parties that a hearing *de*

(continued)

A. Background: The Union Organizing Campaign Begins

The Company operates a small factory which manufactures metal tubing and employs about 50 workers (A. 50; 98, 103-104, 106). In early August 1973,[3] the Union[4] began a drive to organize the factory; and by the end of the first week of that month a number of employees had signed union authorization cards (A. 50, 117-118). On August 10, Company President Harold Grout assembled all of the employees for a brief speech about the union campaign (A. 71, 132-133, 136-137, 138-140, 180-181, 184-185, 186-187, 188-190). In his speech he advised the employees that signing cards would have serious legal consequences and urged them not to do so until they had heard the Company's views on union representation (A. 71, 132-133, 136-137, 180-181, 184-185, 186-187, 189). He promised another meeting within a few days at which these views would be presented (A. 71).

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[2] (continued) *novo* should not be held, vacated its December 10 order and proceeded to make its own review of the record in the case (A. 49, 59). On September 15, 1975, the Board issued a Proposed Decision, Order, and Direction of Election which made proposed findings of fact and conclusions of law on the basis of its review (A. 48-61). On December 1, 1975, after considering the Company's exceptions and brief, the Board adopted its Proposed Decision, Order, and Direction of Election (A. 62-64).

[3] Unless otherwise stated, all dates refer to 1973.

[4] Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, hereafter "the Union".

B. The Company Responds to the Union Organizing Drive by Encouraging and Assisting Employees to Withdraw Their Union Cards and by Coercively Interrogating Them About the Union Activity

Three or four days after Grout's speech Night Foreman James Verbert approached Perry Nowak, an employee on his shift, with a written form for revoking a union authorization card and asked Nowak to sign it (A. 51; 143-144, 148-149). Nowak first responded that he wanted to draft his own letter, but Verbert "made it clear" that he wanted Nowak to sign the form (A. 51; 143-144, 148-149). Nowak then signed, but he asked Verbert not to turn the form in to the Company office (A. 51; 144). Within the next few days Plant Manager John Romer returned the form to Nowak saying that he had neglected to fill in the Company's name, and that it would not be effective unless he did so (A. 51; 144). Nowak said that, as he had told Verbert, he wanted to draft his own letter (A. 51; 144). Romer asked Nowak several times to complete the form; when he refused, Romer became "flustered" and left (A. 51; 149). Nowak did not send a letter requesting the return of his card (A. 51; 149).

On August 15 the employees were again assembled (A. 72, 133-135, 136-137, 180-181, 190-192, 197-198). Company President Grout repeated to these employees his earlier warning about the consequences of joining a union and reminded them that the Company rather than the Union provided wages and fringe benefits (A. 72-75, 136-137, 197). He said that if the Union had refused to return authorization cards to employees who wanted them back, this should make them realize the sort of organization with which they were dealing. These employees, he stated, should write directly to the Union; and he suggested that they use Company copying equipment to make duplicates of their letters to keep (A. 75, 133-134, 136-137, 180-181, 197-198).

On August 16 the Union filed a petition to represent the Company's employees with the Board (A. 50; 95). About that same date Plant Manager Romer told a group of employees that he would give them the Union's address so that they could revoke their union cards (A. 171-172). When employee James Sinsabaugh later asked for the address, Romer gave him a number of slips bearing the address and told him to give them to other employees who wanted to get back their cards (A. 52; 172-175). Also about that day, Foreman Verbert asked Charles Rosenstock, another worker on the night shift, whether he had signed a union card (A. 52; 157-158, 161). When Rosenstock answered affirmatively, Verbert queried whether Rosenstock wanted to have his card returned and offered to give Rosenstock the Union's address (A. 51; 158). Subsequently Rosenstock wrote such a letter, gave it to Verbert, and received a copy of it from the Company after it was mailed to the Union (A. 51; 158-159, 179-180).

At the Company picnic on August 18, Foreman Verbert asked Edward Willard, another employee on his shift, whether he had written to the Union to have his authorization card returned (A. 51; 152-154, 164). When Willard said he had not, Verbert wrote a letter withdrawing Willard's union card and asked him to sign it (A. 51; 152-154). Some time before the picnic Verbert had questioned Willard as to whether he had signed a union card and whether anyone else had signed cards (A. 52; 155-156). Subsequently he asked Willard a "couple of times" to request the return of his card (A. 51; ~~Tr. 452~~ 153). When he again repeated this directive at the picnic, Willard signed the letter and gave it back to Verbert (A. 51; 152-154).

The Union withdrew its representation petition on September 5, and filed a new petition the following day (A. 50; 95). Subsequently an election was scheduled for October 12 (A. 50; 95). On the evening of October 10, Company President Grout assembled the night shift

employees for a final speech concerning the Union (A. 52-56; 192-193). The next day he gave a similar speech to the day shift. In both of these speeches Grout reiterated the themes of those he had given in August, emphasizing the disadvantages which he saw in belonging to a union (A. 52-56, 79-84; 147-148, 196). In addition, he told the employees that the Company was not in good condition financially, and had difficulty competing with other companies because of its location, and that he had considered selling it (A. 54-55; 82-83, 194-195). On October 12, the election was held, and the Union lost (A. 50).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by encouraging and assisting employees to withdraw their union authorization cards, and by coercively interrogating employees concerning their union activities and union sentiments (A. 52, 57, 62).

The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any like manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to post appropriate notices (A. 58-59, 63).[5]

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[5] The Board also found that the Company's violations of Section 8(a)(1) precluded a fair election on October 12 and directed that a second election be held (A. 56-57, 59-60, 63-64). Accordingly, it severed the representation proceeding (Case No. 2-RC-16262) from the unfair labor practice case with which it had been consolidated for trial (Case No. 2-CA-13128) and remanded it to the Regional Director for appropriate action (A. 57, 59-60). Thus, the direction of election in the representation proceeding is not before this Court for review herein, and will not be subject to such review unless and until it forms the basis for a final order in an unfair labor practice proceeding within the meaning of Section 10(e) and (f) of the Act. See, *e.g.*, *A.F.L.*

(continued)

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY ASSISTING AND ENCOURAGING EMPLOYEES TO WITHDRAW THEIR UNION AUTHORIZATION CARDS.

As shown in the Statement of Facts, the Company was firmly opposed to its employees' effort to secure union representation and plainly conveyed that opposition to the employees. While much of the Company's pre-election conduct was not found to be unlawful, the Board did find that the Company exceeded the bounds of lawful opposition when it actively encouraged and assisted employees in withdrawing support from the Union. It is well settled that such encouragement and assistance impairs employees' Section 7 right freely to "form, join or assist labor organizations" and contravenes the "established rule that an employer cannot engage in conduct calculated to erode employee support for the union." *N.L.R.B. v. Deutsch Co.*, 445 F.2d 902, 906 (C.A. 9, 1971), cert. denied, 405 U.S. 988. Indeed, it is difficult to imagine a more direct means of interfering with the rights of employees to choose or not to choose a bargaining representative than employer-sponsored repudiation of the union selected by the employees. *N.L.R.B. v. H.W. Elson Bottling Co.*, 379 F.2d 223, 225 (C.A. 6, 1967). Thus this Court and other courts consistently have held that employer action which seeks and facilitates the withdrawal of employee union authorization cards is violative of Section 8(a)(1) of the Act. *N.L.R.B. v. S & H Grossinger's, Inc.*, 372 F.2d 26, 29 (C.A. 2, 1967); *Edward Fields,*

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[5] (continued) *v. N.L.R.B.*, 308 U.S. 401, 409 (1940); *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F.2d 640, 642 n. 1 (C.A. 2, 1952), cert. den., 345 U.S. 905; *N.L.R.B. v. Lifetime Door Co.*, 390 F.2d 272, 274 n. 3 (C.A. 4, 1968); *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805, 808-810 (C.A. 4, 1965), cert. den., 382 U.S. 831; *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F.2d 100, 106 (C.A. 5, 1963).

Inc. v. N.L.R.B., 325 F.2d 754, 760 (C.A. 2, 1963); *Amalgamated Clothing Workers of America v. N.L.R.B.*, 424 F.2d 818, 824 (C.A.D.C., 1970); *N.L.R.B. v. Priced-Less Discount Foods, Inc.*, 405 F.2d 67, 71 (C.A. 6, 1968).

Here the record clearly shows that the Company utilized an intensive effort to secure union card withdrawals as a means of dissipating the Union's strength and frustrating the employees' free selection of the Union as their bargaining representative. Thus, in his August speeches, President Grout warned employees of the serious legal consequences of signing cards, suggested that they write directly to the Union if they wanted to get their cards back and offered the use of Company copying equipment for that purpose (*supra*, pp. 3-4).[6] Further, the Company applied direct pressure on employees Nowak and Willard to have them get their union cards back. Thus, Foreman Verbert approached both employees without being asked, presented Company-prepared letters asking for withdrawal from the Union, and demanded that they sign (*supra*, pp. 4-5). Verbert's insistence is evidenced by the fact that he did not accept Nowak's declared preference for writing his own letter and "made it clear" that Nowak was to sign the Company's form (*supra*, p. 4). And when Nowak failed to fill the form out properly, Plant Manager Romer sought to compel him to do so (*supra*, p. 4). Verbert also persisted in asking Willard to sign the letter withdrawing his union card until, finally, Willard acquiesced (*supra*, p. 5). The Company indirectly pressured other employees to withdraw their cards. Thus, Verbert gave Rosenstock the Union's address, which he had never requested, so that he could ask for the return

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[6] Although not unlawful in themselves, these statements are properly considered in determining the legality of other contemporaneous Company conduct. See, *e.g.*, *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F.2d 100, 103-104 (C.A. 5, 1963).

of his card (*supra,* p. 5). Similarly, Plant Manager Romer offered this address to a group of employees, and then gave Sinsabaugh, who had asked for the address only for himself, a batch of address slips to distribute to fellow workers (*supra,* p. 5).[7]

In sum, the Company affirmatively sought out employees who had signed cards, solicited their withdrawal of those cards, provided the letters and the address to enable them to do so, and persisted until it succeeded in securing signed letters. That intensive withdrawal effort plainly operated to deny the employees' freely given support for the Union. The Board was amply justified in finding that it violated Section 8(a)(1) of the Act.

Before the Board, the Company sought to evade responsibility for its unlawful campaign to induce the withdrawal of union cards by arguing that the campaign's major proponent, Night Foreman James Verbert, is not a supervisor, and thus that his conduct is not attributable to the Company.[8] The Board rejected that argument and found that Verbert in fact, possesses genuine supervisory power under Section 2(11) of the Act. The courts have made it clear that Board decisions regarding this issue will not be overturned lightly. "The Board's findings in this area", as this Court has noted, "are entitled to special weight since it possesses

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[7] The Board based its findings with respect to each of these incidents upon the uncontroverted testimony of the employees involved. Neither Verbert nor Romer was called to testify; thus the Board justifiably inferred that their testimony would have been unfavorable to the Company. That inference, together with the credited employee testimony, provides ample basis for the Board's finding that the incidents occurred as described. See *Golden State Bottling Company v. N.L.R.B.,* 414 U.S. 168, 174 (1973).

[8] The Company conceded that Plant Manager Romer, who also played a role in this campaign, is a supervisor (A. 50; 96).

expertise in 'evaluating actual power distributions which exist within an enterprise' needed for drawing lines between managerial personnel and the rank-and-file." *Amalgamated Local 355 v. N.L.R.B.*, 481 F.2d 996, 1000 (C.A. 2, 1973), quoting *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1172 (C.A. 2, 1968). See also, *N.L.R.B. v. Swift & Co.*, 292 F.2d 561, 563 (C.A. 1, 1969). Thus, when the Board exercises its "special function of applying the general provisions of the Act to the complexities of industrial life:", *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) and determines that an individual possesses supervisory status, "the Board's determination stands if it has warrant in the record and a reasonable basis in the statute." *N.L.R.B. v. Big Ben Department Stores*, 396 F.2d 78, 82 (C.A. 2, 1968).

Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Moreover, it is well settled that this section is to be read in the disjunctive, and thus that "the possession of any one of the listed powers is sufficient to cause the possessor to be classified as a supervisor." *N.L.R.B. v. Metropolitan Life Insurance Co., supra,* 405 F.2d at 1173. See also, *Amalgamated Local 355 v. N.L.R.B., supra,* 481 F.2d at 999; *Warner Co. v. N.L.R.B.*, 365 F.2d 435, 437 (C.A. 3, 1966); *N.L.R.B. v. Elliott-Williams Co.*, 345 F.2d 460, 463 (C.A. 7, 1965). So long as the power is exercised independently, and in the interest of management, it is a conclusive indicium of supervisory rank. See, *e.g., N.L.R.B. v. Big Ben Department Stores, Inc., supra,* 396 F.2d at 82.

Tested under these principles, the Board's finding that Night Foreman Verbert was a supervisor is amply justified, for the record shows that he possesses the supervisory power to assign work to employees, to transfer them to other jobs, and responsibly to direct them in their work. Thus, Plant Superintendent Monks admitted that Verbert is "responsible for the eight people" on the night shift (A. 51; 108-109). That responsibility includes allocating work to the employees and "keep[ing] a check" on their work (A. 51; 110-111). Verbert is also empowered to move employees from job to job when necessary (A. 51; 109-111). He spends no more than 50 percent of his time doing the same physical work as the rank-and-file employees (A. 51; 109-111). And he is salaried and earns 30 percent more than the other employees on the shift, who are paid by the hour (A. 51; 110). There is frequently no one of higher rank than Verbert present during the night shift (A. 51; 108-109). And, finally, the night shift employees regard Verbert as their supervisor (A. 51; 144-146, 152-153).

These facts clearly indicate that Verbert is a supervisor within the meaning of Section 2(11). He assigns work, he "responsibly directs" employees in their work, and he transfers employees from job to job. Moreover, contrary to the Company's assertion before the Board, there is no evidence that he consulted with anyone of higher rank than he before exercising these powers. And although, as the Company also argued before the Board, the work force under Verbert is relatively small, that factor is irrelevant to his supervisory status. "It is . . . the capability of control", as this Court has held, "rather than the number controlled that is decisive." *Amalgamated Local 355 v. N.L.R.B., supra,* 481 F.2d at 1000. Thus, the Board properly found that Verbert was a supervisor, rather than an employee, under the Act. See *N.L.R.B. v. Big Ben Department Stores, Inc., supra,* 396 F.2d at 82; *N.L.R.B. v. Raymond Buick, Inc.,* 445 F.2d 644, 645 (C.A. 2, 1971).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING EMPLOYEES CONCERNING THEIR UNION ACTIVITIES AND UNION SENTIMENTS.

In carrying out its campaign to have employees withdraw their union authorization cards, the Company interrogated certain employees concerning the Union. Thus, Foreman Verbert's initial step in obtaining union card revocations from Rosenstock and Willard was to ask them whether they had signed such cards. In addition, Verbert asked Rosenstock whether he was "serious" about it, and questioned Willard about the other employees who had signed cards. Interrogations about union activities, though not *per se* unlawful, violate the Act if they are "coercive in light of all of the surrounding circumstances." *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 492 (C.A. 2, 1975). Here that test is clearly met, for the obvious purpose of the interrogations was to enable the Company to implement its coercive scheme to induce defections from the Union. As shown above the Company's questioning resulted in disavowals of the Union which plainly were not voluntary. And, as courts have recognized, interrogations which serve such a function, and produce unwilling repudiations of a union, are inherently coercive. See *N.L.R.B. v. Big Ben Dept. Stores, Inc.*, *supra*, 396 F.2d at 82; *N.L.R.B. v. Elias Bros. Big Boy, Inc.*, 325 F.2d 360, 364 (C.A. 6, 1963). In short, this basis alone provides adequate support for the Board's finding that the Company's interrogations violated the Act.

Additional factors further indicate the coercive nature of the Company's interrogations. Thus, they occurred in the context of Company hostility to the Union, as evidenced by President Grout's anti-union speeches.[9]

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[9] See fn. 6, *supra*.

Moreover, the interrogations were carried out by the supervisor[10] who so tenaciously solicited employee withdrawals from the Union. And the information sought – admissions by the employees questioned that they had signed union cards and identification of other employees who had done so – clearly supplied a basis for future retaliation against individual employees. Any attempt, such as the one directed at Willard, to induce an employee to inform on his fellow workers is singularly coercive, for it implies that the employer intends to take action against those whose names he seeks, and thus makes employees wary of engaging in the activities inquired about for fear that they will be targets for such action. *N.L.R.B. v. Louisiana Mfg. Co.*, 374 F.2d 696, 700-701 (C.A. 8, 1967). See also, *N.L.R.B. v. Builders Supply Co. of Houston*, 410 F.2d 606, 608 (C.A. 5, 1969); *Brewton Fashions, Inc. v. N.L.R.B.*, 361 F.2d 8, 13 (C.A. 5, 1966), cert. denied, 385 U.S. 842. Moreover, the Company took no steps, such as assuring the employees that there would be no reprisals, to mitigate the impact of its questioning.[11] Thus, when all the "surrounding circumstances" are viewed together, and the role of the interrogations in the Company's unlawful campaign is considered in conjunction with these other indicia of coerciveness, clearly there is more than ample support for the Board's finding that these interrogations violated Section 8(a)(1) of the Act.

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[10] See discussion, *supra*, pp. 9-11.

[11] Thus, these interrogations exhibited a sufficient number of the typical characteristics of coercion to be deemed unlawful under this Court's holding in *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2, 1964). See *N.L.R.B. v. Long Island Airport Limousine Service*, 468 F.2d 292, 296-297 (C.A. 2, 1972); *N.L.R.B. v. Scoler's, Inc.*, 466 F.2d 1289, 1291 (C.A. 2, 1972); *N.L.R.B. v. Milco*, 388 F.2d 133, 137 (C.A. 2, 1968); *Bryant Chucking Grinder Co. v. N.L.R.B.*, 389 F.2d 565, 567 (C.A. 2, 1967), cert. denied, 392 U.S. 908.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a judgment should issue enforcing the Board's order in full.

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
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Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 21st day of June, 1976.